

Approaching the present case in the light of these observations, it has never been denied that on the night in question, the night of 28th July last, two men entered the Souter house with weapons and these two men were responsible for the murder of Souter. There has never been any suggestion at any time that there was one man or that there were more than two men or that there was anybody at all who was not connected with the murder. The prosecution case was that these two men were the appellants. That was based on the evidence of Mrs. Souter who identified them at the trial and whose evidence was supported by police evidence that she had identified them prior to the trial at identification parades held, in the case of the first appellant, at the police station, and, in the case of the second appellant, at the Penang gaol. In the case of the first appellant there was also evidence that after the murder he had attempted to sell an amethyst ring which had been removed from the Souter house by the murderers.

The defence was that the appellants were not the men in question, that at the material time they were not in the Souter house but were at home. Mrs. Souter's evidence was not to be accepted not because she was an untruthful witness but because her age and infirmity were such that it was unsafe to rely on her powers of observation. The identification parades were improperly conducted. The stolen amethyst ring was never in the possession of the first appellant; he had found a different ring in the highway and had attempted to sell it but that was not the ring that was produced in court.

In support of this both the appellants gave evidence and they called two witnesses whose evidence, however, was of little importance and such as it was related only to the identification parade at the prison and the ring.

Before us there has been little complaint as to the way the judge dealt with the evidence as to the identification parades and the ring and in our view such complaint as there has been is without substance. The evidence was put to the jury and it was left to them to evaluate it.

It was, however, argued that it was not put to the jury that the defence was one of *alibi*. It is true that that was not put in terms. But properly considered the real substance of that defence was put to the jury, and put in a way that was certainly not unfavourable to the appellants. The real point of their defence, and this was their evidence, was not so much that they were at home at the material time, but it was that they were not at the Souter house at the material time. The jury knew that they denied being there, they had heard them say so, but what they had to decide was whether or not they were satisfied they were there and that was fairly put by the judge who devoted a con-

A considerable portion of his summing-up to the issue, a portion which has to be read in the light of his observations as to the burden of proof which have already been quoted.

B In the particular circumstances of this case we are not prepared to say there was any inadequacy of direction. As was said by Ashworth J. in the case of *Attfield, supra*: "Non-direction merely is not misdirection."

The appeals are dismissed.

Appeals dismissed.

Solicitors: *Rajendra & Teik Ee.*

MOHAMED SAID v. HAJI OMAR

[A.C.J. (MacIntyre J.) March 2, 1965]

[Ipoh — Civil Application No. 1 of 1965]

D *Practice and Procedure — Failure to file statement of defence — Whether there was negligence — Setting aside judgment and decree of subordinate court.*

Subordinate Courts Rules, 1950, O. XIX r. 3(1)(b)
(i) — Claim for "liquidated sum".

E This was an application in revision against the judgment and decree of a magistrate in a civil action for \$460 and costs. The claim was for the balance outstanding in respect of \$500 paid by the respondent to one N.C. in settlement of a debt owed by the applicant and for the repayment of which the respondent had stood surety. The writ of summons was served on the applicant on August 1, 1964. The applicant failed to file a statement of defence but on August 9, he wrote to the court applying for a postponement of the hearing to September 12 in order to enable him to defend the action by procuring certain papers and information from the High Court regarding a bankruptcy proceeding in which he was adjudged a bankrupt in 1958 and discharged in 1960. He also stated in his letter that the debt in question was in respect of a sum of \$135 borrowed by him from one N.V.C. and that since he had disclosed the debt in his statement of affairs, he was not liable to pay the amount claimed by virtue of his discharge from bankruptcy. On August, he also addressed a letter to the judge, High Court, through the assistant official assignee, applying for the relevant documents. The assistant official assignee instead of forwarding the letter to the judge, chose to deal with the matter himself and sent a reply to the applicant confirming that the debt owed to N.V.C. was disclosed in his statement of affairs. The reply was however silent regarding the request for the supply of relevant documents. The result was that the applicant never got the documents he asked for. He again applied for a further postponement, but the magistrate rejected his application and entered judgment by default in favour of the respondent.

H Held: (1) the failure of the applicant to file a statement of defence in this case was not due to negligence or want of diligence and he should be given an opportunity to defend the action;

I (2) having regard to all the circumstances of the case and to the law as expounded in *Walmerhausen v. Gullick* (1) to the effect that the contingent liability of a surety is a debt payable in bankruptcy even though it was not "ascertained at the time of the bankruptcy, nor included in the schedule of liabilities or in the claim of proof", this was a proper case for the High Court to set aside the judgment and decree of the magistrate.

Per curiam: A "liquidated sum" is an amount which is either named under a contract or is capable of being ascertained by arithmetical calculation from the agreed terms of a contract. When a claim is for a liquidated sum then the particulars of the contract by virtue of which it is claimed should be disclosed in the statement of claim.

Case referred to:—

(1) *Walmerhausen v. Gullick* [1893] 2 Ch. 514.

CIVIL APPLICATION.

Parties not represented.

MacIntyre J.: This is an application in revision against the judgment and decree passed in Parit Buntar Magistrate's Court Civil Action No. 107 of 1964 on the 12th day of September 1964 for \$460 and costs.

According to the statement of claim, the aforesaid sum was the balance outstanding in respect of a sum of \$500 paid by the plaintiff to one Nattukottan Chettiar of Bukit Mertajam in settlement of a debt owed by the defendant and for the repayment of which the plaintiff had stood surety.

The writ of summons was served on the defendant on the 1st of August 1964. The defendant failed to file a statement of defence but on the 9th of August and well before the time prescribed for filing the defence, he wrote to the court applying for a postponement of the hearing to 12th September in order to enable himself to defend the action by procuring certain papers and information from the High Court at Ipoh regarding a bankruptcy proceeding in which he was adjudged a bankrupt in 1958 and discharged in 1960. He also stated, in the letter, that the debt in question was in respect of a sum of \$135 borrowed by him from one N. Veerappa Chettiar and that since he had disclosed the debt in his statement of affairs, he was not liable to pay the amount claimed by virtue of his discharge from bankruptcy. The hearing of the civil action was accordingly postponed to the 12th of September.

On the 9th of August, the defendant also addressed a letter to the judge, High Court, Ipoh, through the assistant official assignee, applying for the relevant documents in the aforesaid bankruptcy proceedings for the purpose of proving that the sum claimed in the civil action was in respect of a debt owed to one N. Veerappa Chettiar of Bukit Mertajam and that the debt was proved in bankruptcy and that by virtue of his discharge from bankruptcy in 1960, no further claim in respect of that debt could be maintained. At the same time, the defendant also forwarded a copy of the letter to the High Court which was received by the senior assistant registrar on the 12th.

On receipt of the original letter, the assistant official assignee, instead of forwarding it with his comments to the judge or the senior

assistant registrar, chose to deal with the matter himself and sent a reply to the defendant dated the 12th of August confirming that the debt owed to N. Veerappa Chettiar was disclosed in his statement of affairs. The reply was however silent regarding the request for the supply of relevant documents. Since the original letter was being dealt with by the assistant official assignee, the senior assistant registrar did not feel disposed to take any action on the copy till the original was sent to him. The result was that the defendant never got the documents he asked for; nor was he informed whether the documents would be made available to him or not or advised regarding the procedure for obtaining them.

It would appear, however, from a letter dated the 6th of October in the file in Ipoh High Court Wage Earner's Petition No. 4 of 1958, that the assistant official assignee did on that date forward the original letter to the High Court, but by then it was too late for any further action to be taken.

Now turning to the record in Parit Buntar Magistrate's Court Civil Action No. 107 of 1964, it would appear that the defendant by a letter dated the 9th of September applied for a further postponement of the case to the 26th of September on the ground that his letter addressed to the High Court asking for the requisite particulars to defend the action had not been replied. The learned magistrate, however, rejected the application and entered judgment by default in favour of the plaintiff. In the absence of the defendant in court and in view of his failure to file a statement of defence, the learned magistrate was perhaps justified in refusing the request for a postponement but as to whether he was justified in entering judgment by default in favour of the plaintiff is another matter with which I shall deal later.

Reverting to the letter dated the 6th of October in the file of Wage Earner's Petition No. 4 of 1958, the assistant official assignee who addressed it to the senior assistant registrar, had the following to say:—

"(g) It now appears that the reason why the creditor did not file a claim against the debtor's estate is that the creditor proceeded against Haji Omar b. Mat Yusoff of Nebong Tebal, who was apparently a joint debtor, and received payment of his debt from the said Haji Omar. The said Haji thereupon instituted proceedings against the debtor in Parit Buntar Magistrate's Court C.A. No. 107 of 1964 to recover the amount paid by him on behalf of the debtor and appears to have obtained judgment against the debtor on the 24th of September 1964. The relevant papers in my possession received from the debtor are enclosed."

"(h) When the debtor wrote to me for the first time about this matter in June 1964, I replied to him on the 17th June 1964 to consult a solicitor but I do not know whether or not he did so."

It would appear from paragraph (g) above

that the assistant official assignee had been misinformed as to the date on which judgment was passed. I mention it because it might give rise to the inference that the magistrate did in fact postpone the hearing to that date. The fact is that the judgment was passed on the 12th and not on the 24th of September.

Under Order XIX rule 3(1)(b)(i) of the Subordinate Courts Rules, judgment may be entered by default in the absence of a defendant if the claim is for a liquidated sum. A "liquidated sum" as I understand that term, is an amount which is either named under a contract or is capable of being ascertained by arithmetical calculation from the agreed terms of a contract. When a claim is for a liquidated sum then the particulars of the contract by virtue of which it is claimed should be disclosed in the statement of claim. In the civil action under consideration, the statement of claim does not disclose:—

- (a) The nature of the instrument under which the money was lent;
- (b) Whether the plaintiff signed it as a joint debtor or a surety only;
- (c) The date when the debt fell due;
- (d) The rate of interest charged; and
- (e) The date on which the debt was settled by plaintiff.

In the absence of the abovementioned particulars from the statement of claim, the learned magistrate should have ordered the plaintiff to file an amended statement of claim under Order X rule 12(1) for non-compliance with the provisions of Order X rule 1 before acting, as he did, under Order XIX rule 3(1)(b)(i) or in the alternative, he could have in the absence of the defendant proceeded to hear and determine the action before pronouncing judgment as provided under Order XIX rule 19(3)(1)(b)(ii) of the Subordinate Courts Rules. It is true that in this case the defendant did not file a statement of defence as required under Order X rule 3(1) but the omission could only have at most precluded him, at the discretion of the magistrate, from appearing and defending the action by virtue of Order X rule 7; but the omission does not, in my opinion, relieve the court of its duty to ensure that the pleadings are in order or to "hear and determine" the action under Order XIX rule 3(1)(b)(ii).

I hold that the failure of the defendant to file a statement of defence in this case was not due to negligence or want of diligence and that he should be given an opportunity to defend the action. Having regard to all the circumstances of the case and to the law as expounded in *Walmerhausen v. Gullick* ⁽¹⁾ to the effect that the contingent liability of a surety is a debt payable in bankruptcy even though it was not

A "ascertained at the time of the bankruptcy, nor included in the schedule of liabilities or in the claim of proof", I hold that this is a proper case for the High Court to set aside the judgment and decree dated the 12th of September.

B One complication which may arise in the event of an order for re-hearing would be in regard to a sum of \$100 which the plaintiff has recovered on the decree under a judgment debtor summons; but I think that the difficulty could be resolved by the learned magistrate making an order, in the event of the defendant being successful in his defence, directing the plaintiff to refund the sum of \$100 and any other sum which he may have recovered under the decree.

C I wish however to make it clear that my remarks in the course of this judgment should not be taken as pre-judging the issues in this case. The facts which had come to light as the result of my perusal of certain records is not evidence and the learned magistrate should re-hear and determine this action strictly on the basis of the evidence adduced before him.

D The judgment and decree passed in Parit Buntar Magistrate's Court Civil Action No. 107 of 1964 is therefore set aside and the action remitted to the court of original jurisdiction for re-hearing under the following directions:—

E (a) The plaintiff do within 14 days from the date of service of this order upon him deposit in court the sum of \$100 or any other sum obtained by him from the defendant under the judgment debtor summons taken out in this proceeding, and that the said sum do remain in court pending the determination of this action.

F (b) That, subject to compliance with (a) above, the plaintiff do within 14 days from the date of service of this order upon him file a fresh amended summons and statement of claim incorporating the particulars mentioned in paragraph 10 of this judgment and have the same served upon the defendant.

G (c) That the defendant do thereafter file and cause to be served on the plaintiff his defence in the form and within the time prescribed under rule 3(1) of Order X.

(d) If the plaintiff fails to comply with paragraphs (a) and (b) above, judgment be entered for the defendant with costs, and an order made that the sum of \$100 or any other sum or sums paid under the judgment debtor summons be repaid by the plaintiff to the defendant.

H Order accordingly.

RE CHOP CHAI SOON, A BANKRUPT

[O.Bk.J. (MacIntyre) April 5, 1965]

I [Ipoh — In Bankruptcy No. 90 of 1963]

Bankruptcy — Debts of honour — Preferential treatment over other debts — Whether fraudulent preference — Bankruptcy Ordinance, 1959, ss. 53(1), 54.

The bankrupt utilised money which he had realised by sale of his assets, after committing an act of bankruptcy, in settling the claim of those creditors whose money were deposited with him in preference to settling